TOURO COLLEGE
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 15 | Number 1 Article 3

1998

A Jewish Look at Lawyering Ethics a Preliminary Essay

Steven H. Resnicoff

A JEWISH LOOK AT LAWYERING ETHICS - A PRELIMINARY ESSAY

*Steven H. Resnicoff**

INTRODUCTION

Practicing secular law,[1] a not altogether uncommon career choice among Jews,[2] presents perilous predicaments from the

---

* Professor of Law, DePaul University College of Law. B.A., Princeton University, 1974; J.D., Yale Law School, 1978; Rabbinic Degree, Beth Medrash Govoha, 1983; Chair, Section on Jewish Law, Association of American Law Schools. I express my gratitude to the DePaul University College of Law for the Spring 1998 research leave that enabled me to study and write about Jewish legal ethics, as well as other aspects of Jewish law. I hope to follow up this article with a more particularized analysis of how Jewish law would approach various ethical dilemmas. I very much appreciate the kind support and encouragement I have consistently received from Dean Teree Foster and former Dean John Roberts. I especially thank my dear friend, Rabbi Aaron Small, with whom I studied a number of relevant texts, for his perceptive insights and suggestions. I also thank Ira Kasdan, Esq. and Professors Rodney Blackman, Michael Broyde, Samuel J. Levine and Russell Pearce for their helpful comments. Although Michael Broyde and I have long disagreed about the religious dilemmas confronting a Jewish attorney (I continue to think he substantially underestimates them), I value our many intellectual exchanges.

Given the intricacy and resiliency of Jewish law, and the delicacy of the questions confronted, this Article should in no way be regarded as providing authoritative Jewish law rulings for actual cases. Persons with such questions should personally and carefully consult with a competent Jewish law authority.

[1] Many of the ethical issues discussed in this paper arise in connection with other commercial activities as well and are not endemic to the legal profession. In fact, I look forward to the possibility of exploring these issues in other contexts. Nevertheless, lawyering provides a useful setting in which to examine these matters. First, because secular law provides ethical rules that regulate lawyers, one can compare and contrast the different approaches taken by the secular and Jewish legal systems. Second, many aspects of secular lawyering specifically involve convincing an adversary, a jury or a judge of "facts" that a lawyer may believe to be false. Indeed, law schools - especially through their trial advocacy programs - train people to develop precisely these types of skills. I do not know whether educational programs that prepare people for other professions so routinely stress the development of such dissembling.

perspective of Jewish law (*halakha*).[3] *Halakha* does not explicitly bar Jews from becoming secular lawyers. Indeed, lawyers can importantly promote Jewish interests. For example, they can defend individuals from physical, financial, or psychological oppression, they can protect children in family disputes, and they can advance communal interests by representing organizations committed to Jewish priorities.[4]

Nonetheless, various Jewish law values powerfully militate against the acceptance of *certain* matters or the use of *specific* strategies or conventions. Among other things, Jewish law opposes actions that unfairly harm third parties, that cast the Jewish faith in a falsely unflattering light, or that, because of the actions' spiritually corrosive character, eat away at the intrinsic holiness of the Jewish actor and, indirectly, of the entire Jewish people. Furthermore, as discussed below, Jewish law affirmatively requires an attorney to take some steps that, though morally correct, may be inconsistent with secular regulations. Such rules surely complicate, if not preclude, certain lawyering activities.

---

[2] It has not, however, always been a common career for religiously observant Jews. *See generally* BASIL F. HERRING, JEWISH ETHICS AND HALAKHAH FOR OUR TIMES 91-120 (1984); MICHAEL J. BROYDE, THE PURSUIT OF JUSTICE AND JEWISH LAW 5-8 (1996); Dov Frimer, *The Role of a Lawyer in Jewish Law*, 1 J. LAW & RELIGION 297 (1983).

[3] Rabbi Hayam Halevy Donin aptly describes the term *halakha*:

> Halakha is the overall term for Jewish law . . . Halakha is practical, not theoretical. Halakha is legal, not philosophical . . . Halakha asks for a commitment in behavior. It deals with ethical *obligations* and religious *duties* . . . [H]alakha covers every aspect and relationship of life, whether it be between man and man or between man and G-d. Thus the halakha concerns itself not only with those areas that are generally regarded as being in the realm of ritual and religion, but also with those areas that are generally assigned by non-Jewish scholars to the spheres of morality and ethics, or to civil and criminal law.

See HAYAM HALEVY DONIN, TO BE A JEW 29 (1972).

[4] Lawyers can advance these interests in a variety of ways, such as by drafting model legislation as well as by providing legal counseling and, in appropriate cases, litigative services.

Jewish law offers a sophisticated approach to legal ethics. It recognizes a hierarchy of values,[5] and, in appraising an action in

[5] Jewish law importantly differentiates between biblical commandments, which are those deemed to have been directly transmitted by the Creator to Moses, and non-biblical rules. There are various sources of non-biblical law, including rabbinic law and custom. *See generally* MENACHEM ELON, MISHPAT IVRI (1988); H.CHAIM SCHIMMEL, THE ORAL LAW (1996).

Interestingly, Jewish law does not recognize the literal meaning of a verse in the bible, the *Torah*, as the authoritative statement of biblical law. Indeed, some verses, taken literally, are incomprehensible. For example, the Torah states that on the holiday of *Succot*, referred to by some as the "Feast of Tabernacles," one must perform a ritual involving the waving of certain plants. One of these is referred to as a *pri etz hadar*, which literally means a "fruit of the glorious tree." The Torah does not otherwise specify what type of tree is meant. The oral tradition explains that the verse refers to a particular citron, the *etrog*. Similarly, the Torah uses certain terms without providing their full legal content. For instance, the Torah states that one may not do *melakha* ("work") on the Sabbath, *see, e.g., Exodus* 31:14, or on certain other occasions, but does not clarify what does or does not constitute "work." In addition, although the Torah requires ritual slaughtering of certain animals before their meat may be eaten, nowhere does the written text describe the slaughtering process. Instead, it simply states that animals are to be slaughtered "as I have instructed you," *Deuteronomy*, 12:21, implying that detailed directions had been previously transmitted orally. For a fuller discussion of this topic, *see* H.CHAIM SCHIMMEL, THE ORAL LAW 19-31(1996); BARUKH EPSTEIN, TORAH TEMIMAH, on *Deuteronomy* 12:21.

Instead, Jewish law maintains that an oral tradition transmitted to Moses both amplified and interpreted the written Torah. *See* Menachem Elon, *supra*, at 1:179. This oral tradition not only contains specific laws and information but also hermeneutical rules of interpretation. *Id.* at 270; ARYEH KAPLAN, THE HANDBOOK OF JEWISH THOUGHT 181. According to Jewish tradition, there are a variety of purposes, unrelated to our present subject, for the creation of complementary written and oral traditions. *See* ARYEH KAPLAN, supra, at 178-81, *see also* MAIMONIDES, INTRODUCTION TO THE MISHNAH; ARYEH KAPLAN, THE HANDBOOK OF JEWISH THOUGHT 178-181. There are various approaches as to whether the entire body of biblical laws was communicated to Moses at Sinai. One position is that the written and oral traditions provided at that time conveyed all of the minutiae of Jewish law. A second view is that proper human authorities were authorized to render new interpretations or applications of Jewish law which have biblical status. According to one school of thought, only innovations consistent with the original intent of the Divine Lawgiver are valid, while another approach validates even innovations that differ from such original intent. *See* AARON KIRSCHENBAUM, EQUITY IN JEWISH LAW, BEYOND EQUITY: HALAKHIC ASPIRATIONISM IN JEWISH CIVIL

a specific scenario, considers a wide range of variables.[6] It offers a spectrum of nuanced responses and does not merely require or prohibit particular actions. Instead, Jewish law often encourages or discourages conduct and even offers various degrees of

---

LAW (1991), at xxi-xxiv (asserting that there is a third view as well). Nevertheless, both traditions are sources for rules of biblical status. By contrast, non-biblical rules arise from various origins, such as rabbinic edicts, communal legislation and custom.

[6] For example, in determining whether a person is required to take a particular action, Jewish law usually considers the cost of compliance. Biblical commandments are either characterized as affirmative or negative. Although Jewish law requires that one forfeit all of one's wealth to avoid violation of a negative commandment, *see* SHULHAN ARUKH, *Yoreh De'ah* 157:1, most authorities maintain that it requires one to expend no more than 20% of one's wealth to fulfill any one affirmative commandment. *See* SHULHAN ARUKH, *Orah Hayyim* 656:1.

There is an interesting split of authority as to what determines whether a particular commandment is categorized as affirmative or negative for purposes of this rule. According to one view, the relevant biblical language is decisive. If the verse which is the source of a commandment directs that one should do something, the commandment is an affirmative one. If the verse directs that one should not do something, the commandment is a negative one. The alternative position ignores the form of the biblical language and asks, instead, whether a *violation* of the commandment involves malfeasance or nonfeasance. If a commandment can be violated without doing any act (*i.e.*, if a violation is one of nonfeasance), the commandment in effect affirmatively requires conduct, and there is no need to expend all of one's wealth to avoid a passive violation. On the other hand, if a commandment can only be violated actively (*i.e.*, through malfeasance), one must avoid a transgression even at the cost of one's entire fortune. *See generally* AKIVA EGER, HIDUSHEI RABBI AKIVA EGER, SHULHAN ARUKH, *Yoreh De'ah* 157:1.

These two approaches would render opposite results with respect to a commandment arising out of a verse stating [d]on't be passive as to X. The first view would have no difficulty designating this as a negative commandment. The second view, however, would characterize this as an affirmative commandment, because, by proscribing passivity, the verse requires action. This commandment could be violated by inaction.

Various authorities believe that the obligation to expend or sacrifice all of one's wealth to avoid violation of a negative biblical commandment applies to the avoidance of rabbinic prohibitions as well, such as the *mesayeah* rule discussed *infra*. *See, e.g.*, SHLOMO YEHUDA, EREKH SHAI, HOSHEN MISHPAT 26.

encouragement or discouragement.[7] Expressions of such sentiments are not mere homiletic exercises. They are articulated in legal codices and they sometimes trigger formal action by rabbinical courts.[8] Indeed, the nature of Jewish law is that it is a 24-hour a day, 7-day a week religion with prescribed rules for virtually every activity.[9] A Jew is not entitled to separate her

---

[7] Interestingly, many of the *practical* differences between those rules that Jewish law requires and those that it strongly encourages have become blurred because, at least outside of Israel - and perhaps even in Israel - there are relatively few effective mechanisms for enforcing Jewish law (as opposed to Israeli secular law) against anyone who does not voluntarily submit to its dictates.

[8] These various positions can be illustrated in the context of a promise to sell goods. Usually Jewish law neither encourages nor discourages someone from making such a commercial promise. If, however, one makes such a promise and it is accompanied by the proper legal formality (a *kinyan*), then performance is required. Mere receipt of the purchase price for an item is not a sufficient legal formality under Jewish law's internal rules to make a promise obligatory; a promissor may disavow such a "deal" by returning the funds received. Nevertheless, non-performance is strongly discouraged. A promissor who backs out of a sale by returning the purchase price is required to appear in Jewish court, and the court pronounces a curse on him. Jewish law authorities cite two substantially similar versions of the curse, each of which includes the statement that "He who exacted retribution from the generation of the Flood, will punish those who do not stand by their word." Even where there is neither fulfillment of the appropriate formality nor receipt of the purchase price, failure to perform is discouraged. About a person who fails to perform in such circumstances, the standard Code of Jewish law states that "the Sages are not pleased with him" and that "his trustworthiness" is wanting. *See* SHULHAN ARUKH, *Hoshen Mishpat* 204:7. *See also* BABYLONIAN TALMUD, *Bava Metsia* 49a. Of course, if the promise itself was to do something prohibited by Jewish law, performance of the promise is proscribed.

Secular law can also be perceived as favoring or disfavoring conduct through the provision of tax incentives or tax disincentives. Nevertheless, the purposes for tax rules are not always clear. Governments may impose them simply to generate revenue.

[9] As Rabbi Donin points out:

> [T]he Jewish religion is all-encompassing. There are no areas in the realm of human behavior with which it does not deal or offer guidance. To the extent that every aspect of life is regarded a subject to the guidelines established by the halakha, one cannot regard the Jewish religion - when properly observed - as filling up

existence into discrete personal and professional lives; the same religious guidelines govern business as well as private conduct.[10]

Identifying applicable Jewish laws, and correctly appreciating their impact, is critical to diverse constituencies. Jews contemplating law as a vocation can only effectively evaluate their options if they realize the restrictions under which they would function.[11] Current members of the bar must master the rules in order to comply with them and to circumvent avoidable problems.[12] Jewish institutions that operate law schools may desire to learn about these issues so as to incorporate them, in whole or in part, in their legal ethics and advocacy offerings.[13] More generally, academics, by exploring the rules Jewish law

---

> one of life's many compartments, or that it is separate and distinct from other areas of one's life and concern. A person's eating habits, his sex life, his business ethics, his social activities, his entertainment, his artistic expression are all under the umbrella of religious law, of the religious values and the spiritual guidelines of Judaism. Jewish religion does not disassociate itself from any aspect of life, and does not confine its concern only to ritual acts that have a mystical significance within a supernatural world. Fully and properly observed, the Jewish religion is life itself, and provides values to guide all of life.

See HAYIM HALEVY DONIN, TO BE A JEW 29-30 (1972).

[10] *See, e.g.*, Samuel J. Levine, *The Broad Life of the Jewish Lawyer: Integrating Spirituality, Scholarship and Profession*, 27 TEX. TECH L. REV. 1199 (1996).

[11] Jewish law sometimes imposes *a prior* restrictions that do not apply to those who have already placed themselves at financial risk. Consequently, even though Jewish law might not require an attorney to change his profession or even to change his area of specialization once he has invested in them, Jewish law may strongly discourage a person from becoming an attorney or from focusing on certain types of practice.

[12] By becoming more knowledgeable about how Jewish law and secular law interact, Jewish attorneys may also be able to provide more effective services to religiously observant Jewish clients. Such a client may not be well served even if he successfully obtains a secular judgment, if the client later discovers that Jewish law does not permit him to enforce the judgment.

[13] Of course, even if Jewishly affiliated schools desired to include such materials into their curricula, especially into their legal ethics courses, it would be interesting whether professors at such institutions - especially those who are not Jewish or, if Jewish, are not religiously observant Jews - would oppose this goal by asserting academic freedom claims.

places on attorneys, can better perceive Jewish law's sensitivity to practical realities and ethics and can observe the interrelationship between the secular and Jewish legal systems.[14]

For various reasons, many people are either uninformed or misinformed regarding this topic. First, there are relatively few relevant publications.[15] Second, perhaps because their authors lack adequate training in Jewish law, some writings display insufficient knowledge of Jewish law doctrine, literature,[16] and hierarchies of authority.[17] Third, a few pieces, while written by persons trained in Jewish law, seem, at times, to be polemical or

---

[14] For similar studies, *see, e.g.*, Michael J. Broyde and Steven H. Resnicoff, *Jewish Law and Modern Business Structures: The Corporate Paradigm*, 43 WAYNE L. REV. 1685 (1997); Steven H. Resnicoff, *Bankruptcy Law - A Viable Halachic Option?*, 24 HALACHA & CONTEMP. SOC'Y 5 (Fall 1992); Steven H. Resnicoff, *A Commercial Conundrum: Does Prudence Permit the Jewish "Permissible Venture"?*, 20 SETON HALL L. REV. 77 (1990).

[15] For English publications on Jewish law and lawyering, *see* Hilary R. Kastleman, *Selected Bibliography: Religion and Lawyering*, 66 FORDHAM L. REV. 1643, 1649-1651 (1998); BASIL F. HERRING, JEWISH ETHICS AND HALAKHAH FOR OUR TIMES 91-120 (1984). For non-Hebrew articles on Jewish law, generally, *see* NAHUM RAKOVER, THE MULTILANGUAGE BIBLIOGRAPHY OF JEWISH LAW (1990); PHYLLIS HOLMAN WEISBARD, JEWISH LAW: BIBLIOGRAPHY OF SOURCES AND SCHOLARSHIP IN ENGLISH (1989); J. DAVID BLEICH, CONTEMPORARY HALAKHIC PROBLEMS, Volumes 1-4. *See also* the Jewish law web site sponsored by the Orthodox Union, <http://www.JL.com.>.

[16] In addition to training in Jewish law, some authors lack the language skills, in Hebrew and Babylonian Aramaic, that are necessary to analyze primary resources. This inability, in turn, cripples their efforts to critically evaluate secondary works written in English. To accurately assess such secondary works, one must be able to appreciate the content and context of the primary sources to which they refer and on which they rely.

[17] Consequently, some of these articles seem to discuss the authors' perceptions of how Jewish "values" or "tradition" - as the authors understand them - apply to lawyering, *see* Russell G. Pearce, *The Jewish Lawyer's Question*, 27 TEX. TECH L. REV. 1259 (1996) (discussing such literature), rather than to analyze how Jewish *law* views, or interacts with, secular lawyering. Unfortunately, because of their easy "accessibility" to other modern writers, these articles are often cited and tend to acquire a distorted appearance of importance. This lamentable result is exacerbated by the fact that many legitimate Jewish law authorities do not publicly express their views - at least not in writing - on many sensitive issues of Jewish ethics.

misleading.[18] Finally,[19] the multifarious aspects of legal practice - and the staggering number and complexity of attendant Jewish law issues - make it difficult to treat this topic comprehensively.

---

[18] As an example, I take issue with the work of my friend, Michael Broyde which, among other things, seems to focus very heavily on what Jewish law mandates and forbids, rather than on what it favors or disfavors and to spend a disproportionate amount of text on lenient views while either ignoring or relegating to footnotes more restrictive views, even those held by preeminent authorities. See MICHAEL BROYDE, *supra* note 2. Consequently, a reader of Broyde's work may believe that Broyde is providing definitive characterizations of the views of various Jewish law authorities and providing conclusions about Jewish law that are generally accepted. Nevertheless, I believe that such a conclusion would be unfounded. The views of the Jewish law authorities Broyde cites are often considerably more complex than he suggests, and his conclusions are far more uncertain than he implies.

Although this is not the place for a thorough analysis of Broyde's book, two interrelated examples, regarding the doctrines of *lifnei iver* and *mesayeah*, should be instructive. Discussed, *infra*, in Part I, these rules, which prohibit enabling or assisting others to violate Jewish law, are fundamentally important to an evaluation of Jewish legal ethics.

Broyde states that Maimonides' view is that whenever a Jew aids another to violate Jewish law, the aider violates a *biblical* rather than *rabbinic* prohibition, even if the violation could have been accomplished without the aid. *Id.* at 58. Biblical violations are generally regarded as more serious than rabbinic ones. Broyde then says that, "[A]mong the latter commentaries, it appears that only a single decisor accepts as normative the approach of Maimonides," and, to support this contention, cites YAIR HAYYIM BACHRACH, HAVVOT YAIR 137. However, HAVVOT YAIR 137 deals with a different matter altogether. Moreover, in HAVVOT YAIR 185, Rabbi Bachrach states, as part of his rationale in a particular case, that where a violation could have been accomplished without the aider's assistance, "everyone agrees" that the aider's own violation is no more than rabbinic. Thus, Rabbi Bachrach does not agree with Maimonides' view, as Broyde describes it. Although a mistake as to a particular authority's view can be overlooked, this error regarding Rabbi Bachrach's view is more difficult to understand because his view and/or his responsum 185 is prominently cited by authorities addressing this subject. *See, e.g.*, ZVI HIRSCH EISENSTADT, PITHEI TESHUVA, *Yoreh De'ah* 151; AVRAHAM SHMUEL BINYAMIN SOFER, KETAV SOFER, *Yoreh De'ah* 83; YITZHAK WEISS, MINHAT YITZHAK III:79(6); MESHULAM RATH, KOL MEVASSER I:48; SHLOMO MORDECHAI SCHVADRON, SHUT MAHARSHAM VI:11; YEHUDA ASSAD, YEHUDA YA'ALEH I, *Yoreh De'ah* 177.

Another problem arises in connection with Broyde's discussion of the view of Rabbi Moshe Isserles (*Rema*), a major Jewish law authority, who authored

several commentaries, including one on SHULHAN ARUKH, a standard codification of Jewish law. At one point, SHULHAN ARUKH discusses whether it is permissible to sell to non-Jews items they may use in their religious practices. SHULHAN ARUKH, *Yoreh De'ah* 151:1. *Rema* states that, if the non-Jews could anyway obtain the items elsewhere, there is a split of opinion. One view permits the sale, while a second view opposes the sale. *Rema* then comments "Our custom is to act according to the first [lenient] opinion, [but] a pious person should act strictly [i.e., in accordance with the second view]." Apparently summarizing this comment, Broyde states: "[i]t is permitted to aid another person in sinning if others will do so if the prospective facilitator does not" (*Tosafot* and *Rema*)." *See* MICHAEL J. BROYDE, *supra* note 2, at 59. Broyde says the same thing in an article by Michael Broyde and David Hertzberg, *Enabling a Jew to Sin: the Parameters*, J. HALACHA & CONTEMP. SOC'Y 19:7, 16 (Spring 1990). In yet another article, *On the Practice of Law According to Halacha*, J. HALACHA & CONTEMP. SOC'Y 20:5, 12 (Fall 1990), Broyde makes the point even more clearly: "Thus, the Ramo [i.e., *Rema*] states that any time others (perhaps even only other Jews [footnote omitted] can aid one in the commission of a sin, an observant Jew can do so as well, because no additional sinning occurs." *Id.*

As to *Rema*, Broyde's "summary" is troublesome. First, in a responsum, Rema explicitly rules that helping a Jew to sin, even when the person helped would commit the sin without the help, is rabbinically prohibited. *See* MOSHE ISSERLES, SHUT REMA 52. This responsum is cited, for example, in SHLOMO YEHUDA, EREKH SHAI, HOSHEN MISHPAT 26.

Second, in another of his works, DARKEI MOSHE HAARUKH, *Rema* explains that the lenient custom to sell Gentiles items they would use in their religious practices developed because the religious practices of Gentiles had changed and were no longer idolatrous. As a result, when performed by Gentiles, these practices no longer violated Jewish law. *Yoreh De'ah* 151. In light of this explanation, Rema's requirement that a pious person refrain from selling such items, even when a sale would not contribute to an actual violation of Jewish law, appears relatively stringent. It is not at all inconsistent with his ruling in SHUT REMA 52 involving assistance to one who is actually violating Jewish law.

Indeed, Rabbi Shabtai HaKohen (*Shakh*), an important authority on the SHULHAN ARUKH whose commentary is printed on the same page of SHULHAN ARUKH as the *Rema's*, reminds us why, according to *Rema*, the lenient custom developed. SHABTAI HAKOHEN, SHULHAN ARUKH, *Yoreh De'ah* 151, *sif koton* 7. Presumably, Shakh's purpose is to imply that Rema would rule more strictly in cases involving the facilitation of real *halakhic* violations. Rabbi Bachrach, mentioned above, cites *Shakh* and states that *Rema* would presumably rule stringently in other cases. HAVVOT YAIR 185. Rabbi Zvi Hirsch Eisenstadt, another commentator whose work, PITHEI TESHUVA, is printed in the SHULHAN ARUKH on the same page as the *Shakh's* and *Rema's*,

In recognition of this last point, the purview of this preliminary paper will be limited. It will not address issues arising either from the practice of criminal law or from standard business procedures.[20] Rather, its modest goal will be to provide a

---

excerpts this portion of HAVVOT YAIR 185 and does not disagree with it. Many other authorities similarly construe *Shakh* as stating that the *Rema* only referred to a lenient custom regarding Gentile religious practices. *See, e.g.*, MOSHE FEINSTEIN, IGGEROT MOSHE, *Orah Hayyim* III:27; AVRAHAM SHMUEL BINYAMIN SOFER, KETAV SOFER, *Yoreh De'ah* 83; AHARON KOTLER, SHUT MISHNAT RAV AHARON I:3.

Of course, Broyde could *suggest* that *Rema's* statement about a lenient custom *might* apply even where there is a real violation of Jewish law. *See, e.g.*, YOSEF ISSER, SHAAR MISHPAT, *Hoshen Mishpat* 26:1. What is problematic is Broyde's failure to mention that *Shakh* and HAVVOT YAIR 185 (and, apparently, PITHEI TESHUVA) - whose views appear on the same page of SHULHAN ARUKH as *Rema's* opinion - would apparently disagree with such a suggestion.

I want to emphasize that, *in this essay*, I am not saying that the *Rema's* position is beyond debate. For example, HAVVOT YAIR 185, who states that *Rema's* comment about the lenient custom was limited, nonetheless points to a subtlety in *Rema's* immediately preceding words and suggests that, irrespective of the question of custom, *Rema* may have been personally inclined toward the lenient view. In any event, *Shakh* does not make this observation and PITHEI TESHUVA does not cite this part of HAVVOT YAIR, signifying, perhaps, that they did not regard the subtlety to be important. Nor is it mentioned by Rabbis Sofer, Kotler or Feinstein, who seem to say that, according to *Shakh*, *Rema* would rule strictly where an actual Jewish law violation is involved. *See, e.g.*, MOSHE FEINSTEIN, IGGEROT MOSHE, *Orah Hayyim* III:27; AVRAHAM SHMUEL BINYAMIN SOFER, KETAV SOFER, *Yoreh De'ah* 83; AHARON KOTLER, SHUT MISHNAT RAV AHARON I:3. Finally, *Rema's* position in SHUT REMA 52 - while possibly unavailable to some earlier scholars, is available to contemporary academics - is clear.

[19] The items listed in the text are not intended as an exclusive enumeration of relevant factors. For example, an additional problem is the fact that many leading Jewish lawyers, for various reasons, may only render their opinions orally and privately. At the same time, lesser authorities may publish their views publicly. Because academics may feel obligated to address the relevant published work, the views of such lesser authorities may be given undue prominence.

[20] Those interested in these subjects may want to refer to tapes from a conference, *The Legal Profession Today: A Torah Perspective*, sponsored in New York on November 5, 1989, by Agudath Israel of America. These tapes

framework for exploring two chief concerns associated with the practice of civil law. Part I focuses on the goals of representation. Assuming that the means used are permissible, Part I asks whether Jewish law discourages an attorney from assisting someone in accomplishing *ends* that violate Jewish law. By contrast, Part II asks whether Jewish law discourages the employment of particular *means even if the ends are consistent with Jewish law.*[21] A future paper is planned to focus in detail on a variety of specific legal ethics questions.[22]

PART I - ASSISTING SOMEONE TO VIOLATE JEWISH LAW

Secular law often influences Jewish law. For example, Jewish law recognizes commercial customs as a source of law.[23] In

---

may be available from Agudath Israel, 84 William Street, New York, New York.

[21] Although secular legal ethics codes, subject to certain exceptions, do not recognize an interrelationship between ends and means, Jewish law, just as some secular ethical systems, does. Nevertheless, this topic is beyond our present scope.

[22] In addition to exploring in greater depth the issues raised in this Article, a future paper may focus on topics such as (1) the common scenarios in which a secularly legitimate goal may in fact violate Jewish law; and (2) the conditions under which a Jewish attorney may or may not: (a) represent a client in a secular court; or (b) represent the prosecution or defense in a criminal proceeding. As to this last issue, *see, e.g.*, Michael J. Broyde, *Practicing Criminal Law: A Jewish Law Analysis of Being a Prosecutor or Defense Attorney*, 66 FORD. L. REV. 1141 (1998).

[23] *See, e.g.*, BABYLONIAN TALMUD, *Bava Metsia* 83a. *See also* ISAAC HERZOG, THE MAIN INSTITUTIONS OF JEWISH LAW (1965); MENACHEM ELON, THE PRINCIPLES OF JEWISH LAW (1975), col. 97; SHMUEL DI MEDINA, SHUT MAHARASHDAM 108 (the questioner makes this argument, and Maharashdam comments approvingly); DAVID CHAZAN, NIDIV LEV 12; YISROEL AVRAHAM ALTER LANDAU, BEIT YISROEL 172. A commercial custom may be binding under Jewish law even if a majority of the merchants who established the custom were not Jewish, and even if the custom was established as a result of secular legislation. *See* MOSHE FEINSTEIN, IGGEROT MOSHE, *Hoshen Mishpat* I:72; YOSEF IGGERES, DIVREI YOSEF 21 (stating that this is the view of the Rambam and the Rashba); YEHIEL M. EPSTEIN, ARUKH HASHULHAN, *Hoshen Mishpat* 73:20 (citing YONATHAN EYBESCHUETZ, URIM V'TUMIM). *See*

addition, as to *some* matters, Jewish law applies secular law to transactions among Jews, pursuant to a doctrine known as "the law of the land is valid law" (*dina demalkhuta dina*).[24] Furthermore, Jewish law recognizes secular law as the proper basis on which to adjudicate disputes between non-Jews.[25]

---

generally Steven H. Resnicoff, *Bankruptcy - A Viable Halachic Option?*, 24 J. HALACHA & CONTEMP. SOC'Y 5 (1992).

[24] *See generally* SHMUEL SHILO, DINE DE'MALKHUTA DINA (1974); DAYAN I. GRUNFELD, THE JEWISH LAW OF INHERITANCE 17-46 (1987); R. Hershel Schacter, *"Dina De'malchusa Dina": Secular Law As a Religious Obligation*, I J. HALACHA & CONTEMP. SOC'Y 103 (1981); Steven H. Resnicoff, *Bankruptcy - A Viable Halachic Option?*, 21 J. HALACHA & CONTEMP. SOC'Y 5 (1992); ENCYCLOPEDIA TALMUDIT, *dina de'malkhuta*; OVADIA YOSEF, YIHAVE DA'AT IV:65; ELIEZER WALDENBURG, TZITZ ELIEZER XVI:49; MOSHE TEITELBAUM, HEISHIV MOSHE 90. *See also* Aaron Kirschenbaum & Jon Trafimow, *The Sovereign Power of the State: A Proposed Theory of Accommodation in Jewish Law*, 12 CARDOZO L. REV. 925 (1991); Chaim Povarsky, *Jewish Law v. the Law of the State: Theories of Accommodation*, 12 CARDOZO L. REV. 941 (1991).

[25] Jewish law provides that non-Jews must abide by seven basic categories of law, known as the "Noahide laws", apply to non-Jews. One of these obligations is to establish a judicial system. Most Jewish law authorities believe that this authorizes non-Jews to establish laws that differ from the Jewish laws that govern transactions that are only between Jews. *See, e.g.*, MAIMONIDES, MISHNEH TORAH, *Hilkhot Melakhim* 10:10; OVADIA YOSEF, YEHAVEH DA'AT 4:65; YITZHAK WEISS, MINHAT YITZHAK 4:52:3 (citing authorities); MOSHE FEINSTEIN, IGGEROT MOSHE, *Hoshen Mishpat* II:62. *See also* Nahum Rakover, *Jewish Law and the Noahide Obligation to Preserve Social Order*, 12 CARDOZO L. REV. 1073, 1098-1118, and App. I & II (1991).

Sometimes secular law may even apply to transactions between Jews and non-Jews. The Talmud discusses a case in which a non-Jewish creditor asserts a claim against a Jewish debtor. It says that if, in such a case, the creditor would lose according to secular law, the rabbinic court tells the creditor "Such and such is the result according to your law, and we adjudicate your claim accordingly. *See* BABYLONIAN TALMUD, *Bava Kama* 113a. Maimonides interprets this to mean that secular law applies in disputes between Jews and non-Jews, whether the secular law favors or disfavors the Jewish litigant. *See* MAIMONIDES, MISHNEH TORAH, *Hilkhot Melakhim* 10:12. Most commentators, however, believe that secular law only applies when it favors the Jewish litigant. *See, e.g.*, MOSHE STERNBUCH, TESHUVOT VIHANHAGOT I:795.

Nevertheless, these doctrines do not always operate to alter Jewish law's internal rules.[26] Consequently, Jewish law and secular law will in many cases differ, and, not infrequently, a client's goal may violate Jewish law. In litigation, a plaintiff may desire a monetary judgment even though Jewish law finds the defendant blameless or, if liable, responsible for less than the sum sought. Alternatively, a defendant may seek to avoid a judgment when Jewish law would obligate him to pay. Similarly, a client's goal may be to obtain a secular court order authorizing him to violate Jewish laws regarding child custody or bioethics.[27] In transactional matters, a prospective client may want to consummate a loan involving prohibited interest[28] or write a will disinheriting one of his children.[29] Where a client's goal violates Jewish law, should a Jewish attorney represent such a client? Until Part II, we will assume that the means the attorney would utilize are themselves inoffensive. The issue is whether the attorney should refuse the matter simply because of the client's objective.

Secular law's approach seems fairly clear: an attorney generally cannot counsel or assist a client in conduct that the attorney knows is, according to secular law, criminal or fraudulent.[30] Jewish law is considerably more complex.

---

[26] Exploring these limits would exceed the scope of this paper. Those who are interested, however, should refer to the sources listed in *supra* note 24.

[27] *See generally* Steven H. Resnicoff, *Physician Assisted Suicide Under Jewish Law*, 1 DEPAUL J. OF HEALTH CARE L. 589 (1997).

[28] *See generally* Steven H. Resnicoff, *A Commercial Conundrum: Does Prudence Permit the Jewish "Permissible Venture"?*, 20 SETON HALL L. REV. 77 (1990).

[29] *See generally* SHIMON DURAN, TASHBETZ 147; MAIMONIDES, MISHNEH TORAH, *Hilkhot Nahalot* 6:11; YITZHAK WEISS, MINHAT YITZHAK 1:233; MOSHE FEINSTEIN, IGGEROT MOSHE, *Hoshen Mishpat* 2:49, 50.

[30] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1995). Most jurisdictions have rules that parallel the American Bar Association's Model Rule 1.2(d), which states, in part, that: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . ." Note, however, that this rule does not specifically prohibit an attorney from counseling a client to engage, or assisting a client, in non-fraudulent conduct that is *illegal*, but not *criminal*. Interestingly, the predecessor of Model Rule 1.2(d), Disciplinary Rule 7-102(A)(7) of the

American Bar Association's Model Code, stated that a lawyer shall not counsel or assist his client in conduct that the lawyer knows to be *illegal* or fraudulent. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-10(A)(7) (1994) (Emphasis added).

It is not entirely clear why Model Rule 1.2(d) uses the word "criminal" rather than "illegal," especially since Model Rule 3.4 refers to "unlawful," rather than "criminal" conduct. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4 (1994). It is *possible* that the change was to make it clear that it was not forbidden for an attorney to advise a client to purposely breach a contract. Nevertheless, it seems improbable that Disciplinary Rule 7-102(A)(7) would have been construed to prohibit such advice. No reported case appears to have sanctioned an attorney for giving such advice. Moreover, purposely breaching a contract is unlikely to be regarded as "illegal." *See* Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering,* 104 YALE L.J. 1545 (1995).

More probably, the change in language is to distinguish between violations of criminal law and violations of discovery, tort, or regulatory law. *See, e.g.*, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, LMPC 61:701 (citing authorities). My colleague, Prof. Morrison Torrey, cited violations of various provisions of the National Labor Relations Act (NLRA) as examples of conduct that would be illegal but not criminal. *Id.* Prof. Pepper also cites NLRA violations as examples. *Id.* at 1592. Thus, under the Model Rules, an attorney might be permitted to advise a client to violate a labor law injunction if the cost of compliance would exceed the cost of noncompliance without violation Model Rule 1.2(d). *Id.* Other regulatory statutes similarly create categories of unlawful, albeit not criminal, conduct. *See, e.g.*, G. Robert Blakely & John Robert Blakely, *Civil and Criminal RICO: An Overview of the Statute and its Operation*, 64 DEF. COUNS. J. 36 (Jan. 1997) (explaining that section 1962 of the statute "states what is 'unlawful,' not 'criminal'" and characterizing the statute as "primarily civil and remedial" rather than "criminal and punitive" but not criminal); Mark L. Glassman, *Comment, Can HMOS Wield Market Power? Assessing Antitrust Liability in the Imperfect Market for Health Care Financing*, 46 AM. U. L. REV. 91 (1996) (pointing out that the Clayton Act supplements the Sherman Act by making four enumerated practices illegal, although not criminal"). *But see* Harris Weinstein, *Attorney Liability in the Savings and Loan Crisis*, U. ILL. L. REV. 53 (1993) (stating that Model Rule 1.2(d) should not be read as distinguishing between criminal and other unlawful, but not criminal, acts. It is noteworthy, however, that the Weinstein article does not mention that Model Rule 1.2(d)'s use of the word "criminal" rather than "illegal" was a change from the language of its predecessor, Disciplinary Rule 7-102(A)(7) of the ABA Model Code.

In addition, note that by using the word "knows" both Model Rule 1.2(d) and Model Code Disciplinary Rule 7-102(A)(7) are inapplicable to instances in

All Jewish law authorities should agree that in some situations it would be strictly forbidden for a Jewish attorney to enable, advise or assist a client to violate Jewish law, either because of the biblical duty not to place a stumbling block in front of the blind (*lifnei iver*)[31] or because of the rabbinic rule against assisting wrongdoers (*mesayeah*).[32] One of the reasons for these prohibitions is that it is improper for a Jew, who is supposed to consider herself a servant of God, to help someone frustrate God's Will.[33]

A second aspect of these rules applies only where the wrongdoer is Jewish. Judaism posits the existence of a special interrelationship among Jews, pursuant to which each Jew, as part of the Jewish community, is responsible for the conduct of other members of the community.[34] Consequently, in many situations, if a Jewish attorney is able to prevent another Jew - including her Jewish client - from violating Jewish law, she is obligated to take affirmative steps do so.[35] Similarly, if, by rebuking a Jewish sinner, a Jewish attorney can convince a Jew to mend his ways and return to God, the attorney is required to do so.[36] The attorney certainly cannot encourage such a Jewish

---

which the suspicions that lawyers had did not rise to knowledge. Jewish law, by contrast, might prohibit an attorney from assisting a client even when it is less certain that a client will violate Jewish law.

[31] *Leviticus* 19:14. *See* AHARON HALEVI, SEFER HAHINUKH, *Commandment* 232; SHULHAN ARUKH, *Yoreh De'ah* 151:1, *Orah Hayyim* 347: (and commentaries thereto). *See also* YITZHAK ELIYAHU HAKOHEN ADLER, LIFNEI IVER (1988/89). Although none of these sources specifically discusses attorneys, there is no doctrinal reason why it should be inapplicable to them. The precise boundaries of this doctrine, as well as the rabbinic *mesayeah* doctrine discussed next in the text, are subject to considerable controversy. A detailed discussion of attendant issues awaits a subsequent article.

[32] *Id.* SHULHAN ARUKH, *Yoreh De'ah* 151:1 (and commentaries thereto).

[33] *See, e.g.*, MOSHE FEINSTEIN, IGGEROT MOSHE, *Yoreh De'ah* 1:3.

[34] *See, e.g.*, MAIMONIDES, SEFER HAMITZVOT, *Mitzvat Asei* 205.

[35] *See, e.g.*, YITZHAK WEISS, MINHAT YITZHAK 5:14; ELIEZER WALDENBURG, TZITZ ELIEZER XV:15; MOSHE FEINSTEIN, IGGEROT MOSHE, *Yoreh De'ah* I:72.

[36] *See, e.g.*, MAIMONIDES, MISHNEH TORAH, *Hilkhot Deot* 6:7. If a Jew wrongfully refrains from rebuking his fellow when the rebuke would have

client to violate Jewish law.[37] For this reason, most, but not all, authorities rule that Jews are not legally bound to stop non-Jews from sinning.[38] Nevertheless, Rabbi Yehuda HeHasid, a 12th century authority, states: "If you see a non-Jew committing a transgression and you can stop him, stop him. [After all,] God sent [the prophet] Jonah to Nineveh to cause them [*i.e.*, the non-Jews there] to repent,"[39] and at least one contemporary commentator who denies that there is an obligation to prevent a non-Jew from sinning acknowledges that "it certainly is morally laudatory" to do so.[40]

On the other hand, there are contexts in which, according to various authorities, the *lifnei iver* (enabling) and *mesayeah* (assisting) doctrines may seem to be inapplicable.[41] In such

---

been successful, the Jew is considered as blameworthy as if he himself had committed the violation. *See also* SHULHAN ARUKH, *Yoreh De'ah* 157:1.

For reasons beyond our present scope, if a person is intentionally sinning, many authorities rule that there is an obligation to rebuke him even if it is clear that the rebuke will be ignored. SHULHAN ARUKH, *Orah Hayyim* 608; YISROEL MEIR HAKOHEN, MISHNAH BRURAH 608; MOSHE BEN AMRAM GREENWALD, ARUGAT HABOSEM, *Orah Hayyim* 54. *But see* MOSHE OF COUCY, SEFER MITZVOT GODOL, *Mitzvah* 11.

[37] If the client would not commit the violation without the advice, the adviser would violate the biblical ban against *lifnei iver*. *See* AHARON HALEVI, SEFER HAHINUKH, *Commandment* 232. Even if the client would transgress Jewish law anyway, providing encouragement would seem to be prohibited according to many authorities. *See, e.g.*, YITZHAK WEISS, MINHAT YITZHAK IV:79 (citing various authorities). As a practical matter, it may be extremely difficult for an attorney to avoid offering words of encouragement at some time during the representation of a client, even where the client is trying to violate Jewish law.

[38] *But see* Michael Broyde, THE PURSUIT OF JUSTICE AND JEWISH LAW 51 (Yeshiva Univ. Press 1996) (citing MAIMONIDES, MISHNEH TORAH, *Hilkhot Melakhim* 8:10; SHIMON DURAN, TASHBETZ 3:133; Menachem Mendel Schneerson, HAPARDES 59:9 (5745), *Sheva Mitzvot Shel Benai Noah*).

[39] YEHUDA HEHASID, SEFER HASIDIM 1124.

[40] MICHAEL J. BROYDE, THE PURSUIT OF JUSTICE AND JEWISH LAW 61 (1996).

[41] Some, for instance, may argue that providing assistance would be permissible for a lawyer if the violator would commit the transgression even without such help. *Cf.* NAFTALI TZVI YEHUDA BERLIN, SHUT MEISHIV DAVAR II:32 (where a person earns his livelihood from matchmaking, he may do so

cases, what should a Jewish attorney do? It seems obvious that, *et ceteris paribus*, a Jewish attorney still should not help a person violate Jewish law because it subverts the Divine Will. Even if the transgression would occur without her assistance, why should she become a party to such an unseemly act? Among other things, the bible (the Torah) explicitly commands Jews to "be holy."[42] In his famous commentary on this verse, Rav Moshe ben Nahman, a leading 13th century authority, explains that the concept of holiness involves separation from the mundane and consecration to the Divine.[43] He explains that one could follow every letter of Jewish law and yet be spiritually repulsive *(novel birishut HaTorah)*. He interprets the commandment to "be holy" as directing Jews to separate themselves from many types of conduct that are literally permitted and to adopt practices that are more spiritually pure. Thus, instead of relying on a literal leniency and helping a client breach Jewish law, perhaps an attorney should take a different client, whose goal promotes, or is at least consistent with, Jewish values. After all, G-d grants each person limited resources - physical, intellectual and emotional - and, if a person recognizes that she is His servant, she should try to maximize the morally positive result produced by those resources.

Of course, all other things are rarely if ever equal, and there may be special reasons why a Jewish attorney may feel pressure to work on a matter even if the client's objective may violate Jewish law.[44] If so, what factors should be considered in

---

even if it involves what would otherwise be a violation of *mesayeah*). For reasons I intend to develop in a subsequent article, I believe that the number of cases indicating that one can be lenient on reliance that a client could succeed with another attorney may be substantially exaggerated.

[42] *Leviticus* 19:2.

[43] MOSHE BEN NAHMAN (NAHMANIDES), MIKROT GEDOLOT, *Leviticus* 19:2. Nahmanides makes similar comments with respect to the biblical verse directing Jews to do that which is "good and right." *Id.*; *Deuteronomy* 6:18.

[44] For example, the attorney may be an associate in a firm and rejecting an assignment may endanger his prospects to become a partner. Even if the attorney is already a partner in a firm or a sole practitioner, he may represent the client in many other, perfectly acceptable and lucrative matters. In such

determining what to do?[45] Three issues stand out: (1) the reason *why* the enabling and assisting doctrines are perceived to be inapplicable to the particular case; (2) the specific ways in which the client's objective actually violate Jewish law; and, (3) the reason why the attorney may want to represent the client.

The enabling and assisting principles may appear inapplicable to a given situation for any of several doctrinal reasons. By examining a precise reason, one can test its factual assumptions and can identify other *halakhic* or practical problems that it could engender. For example, assume as Hypothetical A that a Jewish client (Client) whose goal violates Jewish law approaches a Jewish attorney (Attorney). Assume that Client is not regarded under Jewish law as someone who has abandoned Judaism[46] and

---

circumstances, the attorney may not want to risk the income stream such work represents by rejecting this particular matter.

[45] The text's use of the passive tense is intended to hint to the fact that, when confronted with a Jewish law issue, religiously observant Jews often turn to a Jewish law expert. As Boston University School of Law Professor Neil Hecht once told me: "There is a technical term for such people. We call them rabbis." In fact, not even everyone with the title rabbi is qualified to answer questions as to all areas of Jewish law. Moreover, the Jewish law tradition ideally calls for an individual to establish a personal relationship with one or more expert rabbis who could then recommend which Jewish law approaches would best suit the individual.

[46] Some extremely important authorities rule that there is no obligation to rebuke a client who is deemed to have totally abandoned Judaism. *See, e.g.*, YISROEL MEIR HAKOHEN, BIUR HALAKHA 608, *s.v. Aval*; YEHIEL M. EPSTEIN, ARUKH HASHULHAN, *Orah Hayyim* 608:7, and no rabbinic prohibition against assisting transgressions by such persons if these violations would have occurred even without the assistance. *See* SHABTAI HAKOHEN (SHAKH), *Yoreh De'ah* 151:6, as construed, *e.g.*, by MOSHE BEN AMRAM GREENWALD, ARUGAT HABOSEM, *Orah Hayyim* 54.

Nevertheless, the practical impact of this exception may be relatively small. Many authorities argue that many modern Jews, because of the way they were raised, cannot be said to have abandoned Judaism. As one commentator states:

> [A] person who has been brought up in a nonreligious environment where he never had the opportunity to learn about Judaism, is like a child who was abducted by gentiles, and is not considered to be doing wrong purposely. Even if he is later exposed to authentic Judaism, he is not to be blamed for rejecting it, since it is almost

assume that, even if Attorney does not assist Client, Client can prevail with the aid of a non-Jewish lawyer. Assume, further, that Attorney is convinced she cannot persuade Client to abandon his goal. A few Jewish law scholars conclude that, in such a case, if Client purposely proceeds, knowing that his objective contravenes Jewish law, Attorney can represent Client without violating the enabling or assisting principles.[47] Even if this view were authoritative, which is subject to considerable doubt,[48] it would be problematic for Attorney to rely on her personal

---

> impossible to overcome one's childhood upbringing. Therefore, such a person is not to be counted among the nonbelievers, and he should be approached with love and with every attempt to bring him back to the teachings of our faith. [Citations omitted].

ARYEH KAPLAN, HANDBOOK OF JEWISH THOUGHT II, 151 (1992). A number of contemporary authorities indicate that many modern Jews, especially those raised by non-Orthodox parents, should be considered to be such "child-abductees." *See, e.g.*, YISROEL REISMAN, THE LAWS OF RIBIS 98, n.17 (1995) (citing Shimon Grinfield (*Maharshag*) and Avraham Yeshaya Karelitz (*Hazon Ish*) for the rule that such non-observant Jews must be treated the same way as Orthodox Jews regarding prohibitions concerning interest-bearing loans). *See also* YEHIEL YAAKOV WEINBERG, SERIDEI EISH II:10; DAVID Z. HOFFMAN, MELAMED LEHOYEL, *Orah Hayyim* 5; ZVI HIRSCH EISENSTADT, BINYON TZIYON HEHADASHOT 23; MOSHE STERNBUCH, TESHUVOT VIHANHAGOT, vol. I, *Orah Hayyim* 132, 319, 363; CHAIM KOENIG, SHUT HUKEI HAYYIM NISHMAT SARAH, vol. IV, *Hoshen Mishpat* 20 (citing authorities); MOSHE FEINSTEIN, IGGEROT MOSHE, *Yoreh De'ah* II:52, *Orah Hayyim* III:46; IV:71. *But see* BINYOMIN YEHOSHA SILBER, AZ NIDABRU IX:55; YITZHAK WEISS, MINHAT YITZHAK III:79 (relying on the distinction between observant and non-observant Jews to permit the purchase of goods produced by non-observant Jews on the Sabbath, even when the purchase may "cause" such non-observant Jews to work on the Sabbath); OVADIA YOSEF, YABIA OMER II. *Orah Hayyim* 15; MOSHE FEINSTEIN, IGGEROT MOSHE, *Orah Hayyim* V:13(9).

[47] *See, e.g.*, YEHEZKEL LANDAU, DAGUL MERVAVAH, *Yoreh De'ah* 151:1. Although some authorities agree with this view, most do not. EZRIEL HILDESHEIMER, SHUT RABBI EZRIEL I, *Yoreh De'ah* 182 (stating, at least as of the seventeenth century that most of the Jewish law authorities disagreed with Rabbi Landau). YITZHAK WEISS, MINHAT YITZHAK III:79 (stating, in the twentieth century, that most authorities disagree with Rabbi Landau).

[48] *See supra* note 47. Even some authorities who agree with Rabbi Landau contend that one should generally not, *a priori*, rely on this leniency. *See, e.g.*, MOSHE FEINSTEIN, IGGEROT MOSHE, *Yoreh De'ah* I:72, at 128.

perception of her inability to dissuade Client from his intended transgression. Under Jewish law, Attorney might be entitled - or even required - to use various tactics, and, unless she in fact attempts them, it may be difficult to accurately assess their likelihood of success. In addition, Attorney's obligation to dissuade Client is an ongoing one which would require Attorney to continuously re-evaluate whether she could succeed. There is an inherent risk that over time Attorney may forget to reassess her ability to dissuade Client or, that as Attorney's own financial interest in the case develops, her growing bias may cause her to make an inaccurate assessment.[49] Even if Attorney remains aware of her Jewish law obligation to dissuade Client, it is possible that, as a practical matter, her divided loyalties would constitute a conflict of interests that would disqualify her under secular law.[50]

Assuming that Attorney were entitled to rely on the lenient view that she could represent such a purposeful evildoer, there are several additional, collateral problems which should at least be mentioned. First, not only is a Jew prohibited from injuring someone else, whether physically or financially, he is also forbidden to cause such injury, even indirectly. Yet injuring an adversary, at least financially, is often what a client wants - either by getting a money judgment to which he is not entitled under Jewish law or by being legally relieved of a valid Jewish law

---

[49] Of course, a problem of possible bias may arise from the outset because of potential pressures to take the case. The problem, however, may become exacerbated as time goes on because: (1) as the attorney-client relationship develops, the attorney may in fact acquire an ability to influence the client to modify (or even abandon) his demands; (2) as the attorney's personal interest in the matter grows, she may become less able to objectively discharge her Jewish law obligation from her ability to persuade.

[50] *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1996). The American Bar Association Model Rule 1.7(b) states in pertinent part: "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's own interests." *Id.* For example, effective representation may require an attorney to provide a client with encouragement. Yet Jewish law may forbid the attorney from providing such emotional support to a client who is trying to violate Jewish law. *See, e.g.*, YITZHAK WEISS, MINHAT YITZHAK IV:79.

monetary obligation. As a result, even where the *lifnei iver* and *mesayeah* doctrines do not apply, Jewish law may regard an attorney who successfully assists such a client as someone who has improperly caused injury to the clients adversary.[51] Second, an attorney often works very closely with her client for long periods of time. This might violate the general rule not to associate, especially on a close, ongoing basis, with wrongdoers.[52] By becoming accustomed to trying to help clients violate Jewish law, the Attorney may become insensitive to the importance of upholding Jewish law and may fail to rebuke other clients whom she could, if she tried, persuade to abide by Jewish law. Indeed, constant and intense interaction with wrongdoers - many of whom may appear to possess good qualities and may be "good clients" - could even tragically influence Attorney to be less diligent in her own religious observance.[53] Third, often an attorney becomes identified with the client - in the eyes of her adversary, the judge, the jurors and, in notorious cases, the

---

[51] The prohibition against injuring another may be subsumed in the prohibitions against stealing. *See* YAAKOV BLAU, PITHEI HOSHEN V, *Hilkhot Nizikim* 1:1(1) (citing authorities). Causing another injury may constitute a biblical violation, even in instances in which the person who caused the injury would not be civilly liable to pay for the injury. *Id. See also* EZRA BASRI, DINEI MAMANOT 4:12, n.1. (arguing that although Jewish law authorities disagree as to whether it is rabbinically prohibited to assist non-Jews to violate Jewish law where they could have committed the violations without the help, all authorities agree that it is forbidden to assist even a non-Jew to unlawfully harm Jews).

[52] *See, e.g.*, MOSHE STERNBUCH, TESHUVOT VIHANHAGOT I, *Orah Hayyim* 283; MENASHE KLEIN, MISNHE HALAKHOT 7:255. This rule certainly does not preclude efforts to persuade wrongdoers to repent, especially if the person making such efforts is especially gifted or trained for this purpose. It does, however, generally apply to other types of close interaction and should certainly apply to associations designed to assist a wrongdoer to violate Jewish law.

[53] STERNBUCH, *supra* note 52. Sternbuch cites the principle, *Oy Lirasha, Oy Liskheno*, which has several meanings. *See generally*, MISHNAH, *Avot* 1:7; SHLOMO YITZKAKI (*RASHI*), BABYLONIAN TALMUD, *Berakhot* 48a; AVRAHAM YITZHAK KOOK, DA'AT KOHEN, *Inyanei Yoreh De'ah* 193. One of these meanings is that, by associating with those who are spiritually corrupt, a person's own spiritual sensitivity can be corrupted. *See also* KLEIN, *supra* note 51.

general public. If the client is viewed as an evildoer, the attorney may be similarly perceived. If so, by representing such a client, an attorney could violate the directive to be "guiltless before God and Israel,"[54] which is construed not only as a commandment for a person to act correctly but to be seen as acting correctly.[55] If by representing a wrongdoer, the attorney is perceived as acting wrongfully, the attorney could violate the extremely serious rule against causing Judaism to be ridiculed or God's name to be desecrated, *Hillul HaShem*.[56]

On the other hand, assume as Hypothetical B that Attorney is unsure whether Client's purpose violates Jewish law. If Client's version of what happened is accurate, Client may be entitled to the relief he seeks. But Attorney is uncertain as to the accuracy of Client's account - not because Attorney questions Client's honesty, but, in light of other evidence Attorney has seen, she thinks Client may lack the sophistication to really appreciate what transpired. Assume that if Attorney does not assist Client, Client can prevail with the help of a non-Jewish attorney. If so, even if

---

[54] *Numbers* 32:22.

[55] *See* BASIL F. HERRING, JEWISH ETHICS AND HALAKHAH FOR OUR TIME: SOURCES AND COMMENTARY, VOLUME II 250-251 (1989).

[56] *Leviticus* 22:32. *See* DONIN, *supra* note 3, at 43:

> According to the Talmud, the very Sanctification of God's name and the credibility of the religious life hinges, in fact, on the quality of the ethical-moral life. If someone studies Scripture and Mishna, and attends on the scholars, is honest in business, and speaks pleasantly to persons, what do people then say concerning him? "Happy is the father (and teacher) who taught him Torah, . . . for this man has studied the Torah - look how fine his ways are, how righteous are his deeds!" But if someone studies Scripture and Mishna, attends on the scholars, but is dishonest in business and discourteous in his relations with people, what do people say about him? "Woe unto him who studied the Torah, woe unto his father (and teacher) who taught him Torah! This man studied the Torah; Look how corrupt are his deeds, how ugly his ways. (Yoma 86a). *Id.* For a religiously learned or ritually observant person to act in a way that would invite such remarks was regarded as a Desecration of the Divine Name (*Hillul HaShem*), a transgression of the severest spiritual magnitude.

Id.

Attorney knew that Client were not entitled to the remedy sought, most authorities would conclude that, by taking the case, Attorney would only violate a rabbinic prohibition and not *biblical* law. As a general principle, Jewish law rules leniently as to acts that only involve *possible* rabbinic, as opposed to possible biblical, violations.[57] Consequently, given that Attorney is unsure whether Client's plan violates Jewish law at all, neither the enabling or assisting doctrines would apply.[58]

If Attorney's doubt regarding the accuracy of Client's story is reliable, Hypothetical B raises far fewer problems than Hypothetical A. In Hypothetical B it is quite possible that Client's success would in no way frustrate God's Will. In fact, if Client is correct, helping Client prevail might fulfill God's Will. In addition, it is possible that Client is not a wrongdoer and that Attorney's identification with Client will not desensitize her to her religious obligations and will not involve a desecration of God's name.

The second issue, the specific ways in which a client's objective actually violates Jewish law, is especially significant in light of the Jewish law principle not to stand idly while another bleeds (*lo ta'amod al dam re'ekhah*).[59] Authorities interpret this biblical directive as requiring one to affirmatively act to protect another not only from physical, but also from economic, harm.[60] Thus, in Hypothetical A, where Client was a plaintiff who was attempting in violation of Jewish law to financially harm the defendant, the duty not to stand idly by might not only prevent Attorney from representing Client, but might obligate Attorney to

---

[57] The general rule is to be stringent regarding doubtful violations of biblical law.

[58] According to most authorities, the biblical *lifnei iver* doctrine does not apply because the text assumes that even without Attorney's help, Client would accomplish the transgression. The rabbinic *mesayeah* doctrine would not apply because of the rule to be lenient in cases of doubtful violations of rabbinic law.

[59] *See Leviticus* 19:16. *See generally*, Aaron Kirschenbaum, *The Good Samaritan: Monetary Aspects*, XVII J. HALACHA & CONTEMP. SOC'Y 83 (1989).

[60] *Id.*

try to help the defendant. The duty to save another from loss, however, is not unlimited. For example, one person, A, is not required to incur $100 of financial loss in order to save another, B, from a loss of $100 or less. On the other hand, if, for instance, Client was trying to violate Jewish law by obtaining an order allowing him to terminate life support for a Jewish hospital patient,[61] Attorney may be obligated to try to help the patient receive treatment even if in providing such aid Attorney would endure a significant financial loss.[62]

Because there are there are limits on the degree of financial sacrifice one must endure to save a person from financial loss, it is important to determine how much rejecting a case would cost an attorney. Interestingly, Jewish law sometimes distinguishes between the burden of expending money, which may excuse certain action or inaction, and the "mere" loss of prospects for future profit, which may not. It is unclear to what extent this distinction will apply to decisions regarding the representation of particular clients.

PART II - EMPLOYING QUESTIONABLE TACTICS

Assuming that representing a particular client would be appropriate, Jewish law may still regulate *how* the Jewish attorney practices. Indeed, a fundamental, and quite complicated, issue arises as to the circumstances in which Jewish law allows a Jewish attorney to be involved in secular courts and to subpoena Jewish witnesses to testify.[63] Moreover, serious questions exist[64] as to whether Jewish law would permit an attorney to explain the law to parties or witnesses whom she suspects will use the

---

[61] *See, e.g.*, Steven H. Resnicoff, *Physician Assisted Suicide Under Jewish Law*, 1 J. DEPAUL HEALTH CARE L. 589 (1997).

[62] This would presumably include a financial loss that might arise from a malpractice suit brought by Attorney's client.

[63] *See, e.g.*, Michael J. Broyde, THE PURSUIT OF JUSTICE AND JEWISH LAW (1996); Mordecai Biser, *Can an Observant Jew Practice Law? A Look at some Halakhic Problems*, THE JEWISH LAW ANNUAL, Vol. XI, 101-135 (1994).

[64] I hope to address these concerns in a subsequent article.

information to formulate effective lies,[65] to present evidence when the attorney is unsure of its veracity, to argue the possibility of alternative theories in which the attorney does not personally believe, to utilize technical or formalistic arguments to enable a client to avoid an otherwise valid obligation, to impeach the credibility of a truthful witness, to embarrass a possibly truthful witness, or to prompt an adversary to tell the truth by either pretending to possess damning documentary evidence[66] or by having someone pose as a prospective witness who would effectively challenge an adversary's lie.[67] A number of the principles mentioned in Part I, such as *novel birishut HaTorah, Hillul HaShem,* and *lo ta'amod al dam re'ekhah*, may apply to forbid or discourage some or all of these practices. Similarly, additional Jewish law rules may be relevant, such as those that prohibit oral oppression (*ona'at devarim*),[68] tale-bearing, both as to true tales (*loshon ha'rah*)[69] as well as to those that are false (*motzei shem rah*),[70] embarrassing people (*hamalbeen pnei havero birabeem*)[71] and deception (*geneivat da'at*)[72] and that require one

---

[65] Secular law codes generally permit an attorney to assume that a client, for purposes of the legal representation, is honest, unless the attorney at the least has very strong evidence and possibly until the attorney has knowledge to the contrary. According to some commentators at least, Jewish law takes a very different approach, permitting the giving of advice to a litigant only if there is reason to believe that the client is honest and that the client's claim is just. *See* BASIL F. HERRING, JEWISH ETHICS AND HALAKHAH FOR OUR TIME: SOURCES AND COMMENTARY 99-106 (1984).

[66] This sort of trick was used by Louis Nizer in his representation of Quentin Reynolds who sued Westbrook Pegler for defamation. This litigation, described in Nizer's book, MY LIFE IN COURT, was later made the subject of a play and a made-for-television movie. LOUIS NIZER, MY LIFE IN COURT (Doubleday & Company, Inc. 1961).

[67] This was essentially the stratagem used by the character played by Tom Cruise in the movie, *A FEW GOOD MEN (Columbia Pictures Industries, Inc. 1992).*

[68] *Leviticus* 25:17. *See also Leviticus* 19:33-34; *Exodus* 22:20-23. *See generally* BABYLONIAN TALMUD, *Bava Metsia* 58b.

[69] *See generally* YISROEL MEIR HAKOHEN, HAFETZ HAYYIM.

[70] *Id.*

[71] *Id.*

to be honest (*hein tzedek*)[73], to pursue justice (*tzedek, tzedek tirdof*)[74] and to distance oneself from falsehood (*medevar shekker tirhak*).[75]

Ironically, in some ways, Jewish law may be more restrictive of lawyers than applicable American law, while being more permissive in other ways. This may be substantially explained by two major differences between the Jewish and American legal systems. First, the American legal model[76] is adversarial, in which the parties and their representatives actively present the evidence and argue the case to a relatively passive trier of fact, while the historical Jewish law model is inquisitorial,[77] in which the trier of fact is actively involved in the elicitation of evidence and examination of witnesses. The American adversarial model, rightly or wrongly, places great emphasis on the client's ability to rely on her attorney's loyalty. Although the precise extent of these secular rules vary from one jurisdiction to another, a client is the beneficiary of fiduciary duties owed by her attorney, is entitled to confidentiality (even as to information that may harm others),[78] and can, in some instances, fire her attorney without

---

[72] *See* BABYLONIAN TALMUD, *Hullin 94a*; MAIMONIDES, MISHNEH TORAH, *Hilkhot Mekhira* 18:1-4.

[73] *Leviticus* 19:36; MAIMONIDES, MISHNEH TORAH, *Hilkhot Mekhira* 7:8.

[74] *Deuteronomy* 16:20.

[75] *Exodus* 23:7.

[76] Interestingly, some European secular legal systems employ an inquisitorial model.

[77] Frimer, *supra* note 2, at 297.

[78] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983). Although the American Bar Association Model Rules of Professional Conduct ("ABA Model Rules") do not, per se, have the effect of law, by now most states have patterned their own legally binding rules after them. ABA Model Rule 1.6, in part, states that:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

incurring the legal liabilities that would accrue from firing other "employees."[79] Because of its inquisitorial model, Jewish law for a long time resisted the use of attorneys.[80] Although attorneys are now accepted, Jewish law never adopted rules giving a client greater rights as to her attorney than she would have as to other employees or agents.

---

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.

(2) to establish a claim or defense on behalf of the lawyer . . .

Id.

Many states have adopted different versions of this rule (sometimes requiring and sometimes permitting more disclosure than the ABA rule), and some states have specific statutes that may require disclosure in certain specific contexts. Examination of the ABA rule is nonetheless instructive. According to this provision, a lawyer could not reveal information relating to representation of a client even if disclosure were necessary to save someone from imminent death or substantial bodily harm if such death or harm were not going to be the result of the "client's criminal act." *Id.* Thus, if it would be the result of someone else's act or of the client's act, but not from the client's "criminal" act, the exception in (b)(1) would not apply. *Id.* Indeed, it seems clear that the exception is inapplicable even if death would result from the client's criminal act provided that the death was not an "imminent result." In any event, there certainly is no exception where the harm to the third party is financial. Depending on how flexibly courts wish to construe "substantial bodily harm," there may be no exception where the injury, albeit serious, is emotional or psychological. Moreover, the word imminent seems to modify "substantial bodily harm" just as it modifies "death." After all, "death" is more serious than "substantial bodily harm," and if the exception only applies to prevent imminent death, it seems that it would apply only to prevent imminent substantial bodily harm.

Jewish law's approach is quite different. *See, e.g.*, Gordon Tucker, *The Confidentiality Rule: A Philosophical Perspective with Reference to Jewish Law and Ethics*, 13 FORDHAM URB. L.J. 99 (1985). *See also* Russell G. Pearce, *To Save a Life: Why a Rabbi and a Jewish Lawyer Must Disclose a Client Confidence*, 29 LOY. L.A. L. REV. 1771 (1996).

[79] *See, e.g.*, Bella v. Gambro, Inc., 584 N.E.2d 104 (Ill. 1991). *But see, e.g., General Dynamics Corp. v. Superior Court*, 876 P.2d 487 (Cal. 1994). *See generally* Damian Edward Okasinski, Annotation, *In-House Counsel's Rights to Maintain Action for Wrongful Discharge*, 16 A.L.R.5TH 239 (1994); Robert B. Fitzpatrick, *Update on In-House Counsel's Right-to-Sue*, SC08 ALI-ABA 1471 (July 17, 1997).

[80] *See* HERRING, *supra* note 65, at 91-120; Frimer, *supra* note 2.

Nor do applicable secular ethics rules or customs directly allow Jewish attorneys to cut ethical corners. There are indigenous Jewish law principles that, in some contexts, permit secular law and commercial custom to affect people's monetary rights and obligations.[81] Nevertheless, they do not directly affect non-monetary duties, such as the duty not to stand idly by while another - even your client's adversary - is harmed in violation of Jewish law[82] or the duties not to deceive or oppress. Thus, the secular duty to zealously represent one's client would not allow a Jewish attorney to use methods, even if permitted under secular law, that violate Jewish law standards regarding deception and oppression.

The second major distinction is that Jewish law focuses on the need to achieve justice in each case, while American law focuses more substantially on process.[83] To promote process, specifically its adversarial process, American law compromises on justice in individual instances, such as by requiring an attorney to withhold

---

[81] *See generally* Steven H. Resnicoff, *Bankruptcy Law - A Viable Halachic Option?*, 24 J. HALACHA & CONTEMP. SOC'Y 5 (Fall 1992).

[82] *See supra* note 6 and accompanying text. *See also* text associated with and immediately following *supra* notes 59-62 (noting that the scope of a person's Jewish law obligations depends on their attendant financial burdens). By imposing additional burdens, such as through the creation of secular causes of action for violation of fiduciary duties or establishment of a standard for determining malpractice, secular law or commercial custom can indirectly affect one's Jewish law responsibilities.

[83] It must be noted, however, that Jewish law does set forth some procedural requirements of its own. In many instances these are construed as being biblically required. Rabbinic authorities disfavor the creation of additional loopholes, in part because of the obligation to "eliminate the evil from your midst," which appears in many biblical verses. *See, e.g.*, *Deuteronomy* 13:6, 17:7, 19:19, 21:21, 22:21, 22:24, 24:7. *See generally* Hershel Schachter, *Dina Di'Malchusa: Secular Law as a Religious Obligation*, 1 J. HALACHA & CONTEMP. SOC'Y 103 (1981). *Cf.* HANINA BEN-MENACHEM, JUDICIAL DEVIATION IN TALMUDIC LAW: GOVERNED BY MEN, NOT BY RULES (1991).

In addition, it is critical to point out that this essay focuses on the restrictions Jewish law may impose on Jews practicing *secular law* generally, not on the rules that would pertain to lawyers and other participants *in a rabbinical court proceeding*.

confidential information even if such non-disclosure enables an innocent party to be wrongfully harmed.[84]

Because Jewish law concentrates on accomplishing justice in individual cases to a greater extent than American law,[85] Jewish law more often has to struggle with the thorny decision as to when important ends can warrant questionable means.[86] As already mentioned, Jewish law posits various prohibitions against deceit. In a number of contexts, Jewish law nevertheless permits limited deception if the goal to be effectuated is sufficiently important.[87] Consequently, those interested as to whether, in particular scenarios, Jewish law would allow the types of tactics identified at the beginning of Part II need to consult with an experienced Jewish law expert who can analyze primary Jewish law sources.

---

[84] *See supra* note 78. Some may try to argue that confidentiality is also an ethical issue. Perhaps this might be true in the present context in which clients arguably rely on the fact they are told that their confidentiality will be relatively inviolate. It is not at all clear that there is any ethical mandate for a rule that, in the first instance, entitles clients to such confidentiality. As a separate matter, however, it must be acknowledged that some commentators may argue that the purpose of the secular law compromise is to further justice indirectly, because they believe that, overall, the adversary system is more successful than its alternatives at achieving justice.

[85] Some, but not many, secular ethics rules are also the product of a balancing of process versus justice. Thus, there are some exceptions to the secular confidentiality rules. *See supra* note 78.

[86] Given the diversity of values held by different Americans, it would be difficult to agree how to resolve the issue of whether a particular goal justifies certain methods. Moreover, secular regulation is not predicated upon any basic assumption that people will want or try to comply in good faith. DePaul Prof. Jim Colliton, a colleague who teaches tax law and who formerly worked for the Internal Revenue Service, once commented that he thought that most attorneys approach the ethics code the same way as they approach the tax code; they look for every technical loophole they can find. As a result, secular law generally recognizes a need to facilitate enforcement of some basic, bright baselines - such as a blanket prohibition against intentional misrepresentations.

[87] *See* AARON LEVINE, ECONOMIC PUBLIC POLICY AND JEWISH LAW 86 (1993) (discusses opinions of various Jewish law authorities as to whether a job applicant can engage in apparently deceptive conduct to dispel a prospective employer's unreasonable concerns).

Even if Jewish law would theoretically permit the aforementioned tactics in a particular case, such use may still be disfavored because of the Jewish law belief that a person's character is influenced by his actions (*nifal lifie pe'ulotov*).[88] Thus, according to a number of authorities, several rules against deception are designed to protect a prospective deceiver from the negative spiritual impact of deceiving and not merely to protect parties from being deceived.[89] It is possible that this negative effect could even occur when an act is specifically required by Jewish law. The Torah discusses the possibility that most of the inhabitants of a Jewish city could become idolaters.[90] In such a case, G-d commands that all of the people in the city be put to death.[91] Immediately after this discussion, G-d promises the Jewish nation that he will bestow mercy upon them. Rabbi Hayyim ben Moshe Attar explains the juxtaposition of these verses.

He states that the natural effect of executing capital punishment on all of a city's inhabitants, although done pursuant to G-d's commandment, would ordinarily be to develop the trait of cruelty.[92] G-d therefore provides a special promise that the nation will be protected against this natural phenomenon. It is uncertain whether the same protection is afforded in other contexts.

This concern may also help explain a rarely stated Jewish law rule, *halakha vi'ain morin kain*, which means "this is the legal rule, but one should not teach people it."[93] Thus, Jewish authorities discuss a tragic situation in which non-Jews have surrounded a group of Jews and issued an ultimatum that unless the group turns over a specific person, they will kill the entire

---

[88] AHARON HALEVI, SEFER HAHINUKH, *Commandment* 16. Jewish literature seems to express this concept in several ways. For example, the sages report that once someone repeats a certain transgression, he becomes desensitized to the fact that the action is forbidden (*shana vihutra lo*).

[89] MAIMONIDES, MISHNEH TORAH, *Hilkhot De'ot* 2:6; ELIEZER WALDENBURG, TZITZ ELIEZER XV:12 (citing Rebbenu Yonah).

[90] *Deuteronomy* 13:15.

[91] *Deuteronomy* 13:16.

[92] *See* OHR HAHAYYIM, MIKROT GEDOLOT, Deuteronomy 13:18.

[93] *See, e.g.*, MAIMONIDES, MISHNEH TORAH, *Hilkhot Yesodei HaTorah* 5:5.

group of Jews. Maimonides explains that "[i]f the specified person in fact deserves capital punishment, such as Shiva ben Bikhri, the group can turn the person over - but do not *a priori* teach them that this is the law."[94] Perhaps part of the reason why this law should not be taught, even though the lives of all of the group's members are at stake, is because of the deleterious effect such an action would have on the moral sensibilities - on the holiness - of the members of the group themselves.

CONCLUSION

Jewish law has much to say about how one may practice secular law and speaks not only through mandate and proscription, but also through encouragement and discouragement. Jewish law's affirmative duties and prohibitions should not be studied in isolation from its many other, more graduated, guidelines. Yet as a practical matter, Jewish lawyers exist in a secular environment which, because of its emphasis on the attorney-client relationship and the adversary process, exhorts attorneys to represent clients irrespective of the moral repugnance of their causes and trains them to employ techniques that, at least in individual cases, are not designed to reach a just result - or a result that complies with Jewish law. This ambience operates to deaden a Jewish lawyer's sensitivity to Jewish law obligations and aspirations.

The Mishnah, around which Talmudic discussions revolve, states that a person should teach his son a profession that is "clean and easy" (*nikiyah vikalah*).[95] This expression can be construed as referring to an occupation that is relatively free from Jewish law complications.[96] Although much good can be

---

[94] *Id.*

[95] MISHNAH, *Pirkei Avot* 1:6.

[96] MENASHE KLEIN, MISHNE HALAKHOT 7:255.

accomplished by Jewish attorneys, not all forms of secular lawyering satisfy this condition.[97]

[97] *Id.* (arguing, generally, that secular lawyering does not satisfy this criterion).